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| Investigation by the Department of Telecommunications and Energy, on its own motion, as to the propriety of the rates and charges set forth in M.D.T.E. No. 17, filed with the Department on May 5, 2000 and June 14, 2000 to become effective October 2, 2000 by Verizon New England, Inc. |) | D.T.E. 98-57- |
| d/b/a Verizon Massachusetts |) | Phase III |
| |) | |

On August 15, 2002, Verizon filed with the Department, for informational purposes, a copy of a PARTS tariff revising Tariff F.C.C. Nos. 1 and 11 (Letter from Verizon to Department (Aug. 15, 2002) (citing Verizon Transmittal No. 232 (FCC Aug. 9, 2002))). The

proposed offering appears to be similar to the hypothetical offering that was presented in this proceeding, except that there is no plug and play option.

II. U.S. TELECOM

A. Positions of the Parties

1. Verizon

Verizon argues that U.S. Telecom did not affect the standard of review and the required analysis for resolving the issues in this case, because the FCC's four-part test for unbundling of packet switching was not met (Verizon Comments at 7 (June 24, 2002)). Further, Verizon argues that the D.C. Circuit specifically rejected the packet switching unbundling rules, holding that the FCC's analysis of "impairing" cost disparities was too "broad and unrooted in any analysis of the competing values at stake in implementation of the Act" to uphold the unbundling rules (*id.* at 4 (June 24, 2002) (citing U.S. Telecom, 290 F.3d at 428)). Verizon further states that the court held that the FCC "failed to consider the relevance of competition in broadband services coming from cable (and to a lesser extent satellite)" (*id.*). Verizon argues that although the court did not vacate the UNE Remand Order, the FCC's unbundling rules are still in question and must be rewritten in a manner consistent with the court's requirements (*id.* at 5). Nevertheless, Verizon argues that if the Department proceeds with this case, the Department should not take further evidence or briefs, but can decide the case as already presented by the parties (*id.* at 6).

Verizon argues that the Department should not proceed with this case, until the FCC responds to the court's remand when it issues its Triennial Review order or completes a second UNE Remand proceeding, in order to avoid wasting resources (*id.*). Verizon argues that the current record is insufficient to support the impairment analysis required by the court and that the Department has no authority to determine whether packet switching should be unbundled (*id.* at 7-8). Rather, Verizon contends that § 251(d)(2) of the Telecommunications Act provides that only "the Commission shall" engage in the impairment analysis (*id.* at 8 (citing 47 U.S.C. § 251(d)(2))).¹ Further, Verizon contends that § 251(d)(3) restricts the states'

¹ Verizon also argues that the Department does not have jurisdiction to review a PARTS tariff on the grounds that internet traffic is predominantly interstate for jurisdictional purposes (Verizon Reply Comments at 3 (July 1, 2002)). Although this argument may demonstrate why an ADSL *retail service* should be tariffed with the FCC, it does not demonstrate why the Department would not have jurisdiction over determining whether a *network element* should be available as a UNE. Cf. 47 U.S.C. § 251(d)(3). Therefore Verizon's jurisdictional argument cannot be addressed until the Department reviews Verizon's unbundling obligations.

authority to unbundle packet switching unless the state rules are “consistent with the requirements of [§ 251]” and would not “substantially prevent implementation of [§ 251] and the purposes of [the competition provision of the Act]” (*id.* at 8-9 (citing 47 U.S.C. § 251(d)(3))). Verizon argues that if the FCC acts, any state unbundling mandate is “inherently inconsistent with § 251” (*id.* at 9).

2. Covad

Covad argues that Verizon is still obligated to provide UNEs after U.S. Telecom. Covad states that the D.C. Circuit did not vacate the UNE Remand Order or 47 C.F.R. § 51.317. Covad argues that § 51.317 explicitly gives states independent authority to require further unbundling (Covad Comments at 5 (June 24, 2002)). Moreover, Covad asserts that the FCC’s Bell Atlantic/GTE merger conditions continue to require Verizon to provide UNEs in accordance with the UNE Remand Order and the Line Sharing Order until June 2003, notwithstanding appeals of those orders (*id.* at 6). Furthermore, Covad argues that the Department has independent authority to review unbundling requirements for PARTS, because the FCC may not preclude state commission regulations, orders, or policy that “(A) establishes access and interconnection obligations of ILECs; (B) is consistent with the requirements of § 251; and (C) does not substantially prevent implementation of this section and the purposes §§ 251-261” (*id.* at 8 (citing 47 U.S.C. § 251(d)(3))).

Covad cites the regulatory uncertainty itself as the reason why the Department should proceed without waiting for the FCC to complete its Triennial Review (*id.* at 12). Covad asserts that the Triennial Review is not likely to be complete until well into 2003, and that the PARTS architecture will remain unavailable, while at the same time Verizon will continue to deploy it and lock in more and more Massachusetts customers (*id.*). Covad states that the Department need not make a conclusion today regarding the “scope of the evidence” or the “analysis required” in reopening the record (*id.* at 13). Covad argues that in addressing “impairment,” the Department should reopen the record in order to review “whether either (i) the wholesale reconstruction of a local cable network, or (ii) the collocation of DSLAMs at or near all of Verizon’s remote terminals, are realistic economic alternatives for carriers seeking to enter the broadband market in Massachusetts in a ubiquitous manner” (*id.* at 13-14). Further, because the focus of this case until now had been on whether unbundling PARTS, including the plug-and-play option in particular, was required under the FCC’s packet-switching criteria, Covad argues that the Department should permit the parties to address

whether the functionality of Verizon's proposed broadband "service" should be provided as an end-to-end UNE (id. at 14).²

3. AT&T

Similarly to Covad, AT&T argues that U.S. Telecom does not limit the Department's authority to promote local competition in Massachusetts (AT&T Comments at 8 (June 24, 2002)). AT&T argues that the Department may "exercise authority under state law to impose additional requirements upon Verizon, so long as they are 'not inconsistent' with any federal rules" (id. at 9 (citing 47 U.S.C. §§ 261(c), 251(d)(3), 252(e)(3))). AT&T further argues that Congress did not intend to occupy the field of telecommunications regulation, and that there is no conflict between state and federal law when it is possible to comply with both sets of regulations (AT&T Comments at 9).

AT&T argues that the Department should not await the FCC's review of packet switching because the review of PARTS does not involve "packet switching" issues (id. at 10, 12). AT&T contends that other state commissions have found, regarding SBC's Project Pronto, that the technology involved "is something materially different from the DSLAM technology that the FCC has for the present labeled as packet switching" (id. at 10). AT&T states that it intends to show that unbundled access to a "unified NGDLC loop" will facilitate the deployment of both packet and circuit switches by CLECs (id.).³ Even if this investigation does implicate the FCC's current definition of "packet switching," AT&T argues that the Department should not wait for the FCC to address packet switching, because the FCC's decision will only set a floor, and the Department may impose additional unbundling requirements that are not inconsistent with federal law (id. at 12-13).

² Covad states that it now believes that an "end-to-end UNE is the most efficient manner for CLECs to have access to line shared loops served via [next generation digital loop carrier ("NGDLC")]" and that the record should be reopened to provide an opportunity "to submit additional evidence on the need to unbundle PARTS as an end-to-end UNE, as opposed to the plug and play . . . option which has been the focus of this case thus far" (Covad Comments at 3 (June 24, 2002); see also AT&T Comments at 10-12 (June 24, 2002) (arguing that the issue presented in this case concerns unbundled access to a "unified NGDLC loop"))).

³ AT&T also argues that the Department should review whether the PARTS offering should be modified to include electronic loop provisioning. I address this separately below.

4. Worldcom

Worldcom argues that U.S. Telecom has no effect on this proceeding because the court did not vacate the UNE Remand Order (Worldcom Comments at 1-2 (June 24, 2002)). Therefore, Worldcom contends, the FCC's unbundling rules remain in effect until they are changed (id. at 2). Worldcom raises essentially the same arguments raised by Covad and AT&T regarding the continuing effect of the Bell Atlantic-GTE merger conditions and the authority of state commissions to unbundle elements (id. at 2-4). Worldcom contends that the FCC's list of UNEs is a minimum list that states can add to, but not subtract from, so long as the state commission complies with 47 C.F.R. § 51.317 (id. at 4 (citing 47 C.F.R. § 51.317; UNE Remand Order at ¶¶ 153-54)).

Worldcom contends that if the Department proceeds with this investigation, the analysis that the Department must conduct in determining whether PARTS must be unbundled is still the "necessary" and "impair" analysis required in 47 C.F.R. § 51.317 (Worldcom Comments at 5-6 (June 24, 2002)). If, however, the Department decides to address the factors raised by U.S. Telecom, Worldcom contends that these issues may be addressed expeditiously, because most of the factors raised do not apply to line sharing or to packet switching (id. at 6). Worldcom suggests that if the Department addresses the issue of intermodal competition, it should review: (i) the existence, extent, and efficacy of cable alternatives for business customers; (ii) the number of residential customers who today have a choice between cable and DSL; and (iii) where customer choice exists, whether the existence of a duopoly is consistent with the public interest, the policies of the Telecommunications Act, and Massachusetts law (id. at 7).

Worldcom also suggests a number of factors to review if the Department decides to analyze the effect of cost disparities on new market entrants (id. at 9). These factors include: the effect of Verizon's existing and extensive local distribution networks; economies of scale enjoyed by Verizon and the sunk costs and initial investments needed to achieve that scale; and local barriers to entry associated with securing rights of way and building access (id.).

Worldcom argues that the D.C. Circuit in U.S. Telecom suggested that the FCC should "consider whether the impairment analysis should be conducted on a more localized basis for some or all elements," but did not direct that a more localized analysis be conducted for any particular element (id.). Worldcom argues that although a Massachusetts-specific impairment analysis for fiber-fed loops would be more granular, and therefore consistent with U.S. Telecom, the Department should adopt a strong presumption that line sharing and packet switching issues be addressed based on national data (id. at 8-9). Worldcom asserts that there are no relevant geographic variations for voice-grade copper loops or fiber-fed loops that would change the impairment analysis (id. at 9).

B. Analysis and Findings

1. Background

The scope of the Department's investigation in this Phase has been, and remains, "whether and to what extent Verizon is required to provide the means for CLECs to offer xDSL services in a DLC environment." D.T.E. 98-57 Phase III, at 80. The CLECs had argued that the local loop does not end at the remote terminal, or that the fiber subloop should be available as a UNE, and that access to the subloop should also permit plug and play. See id. at 84-86. Because the Line Sharing Order already required ILECs to provide unbundled access to the high frequency portion of their copper loops, the Department only directed Verizon to file a proposed tariff that would allow plug and play and a tariff for the feeder subloop. Id. at 87. Although Verizon had not yet deployed the technology to provide such an offering, the Department decided to review a hypothetical offering prospectively, in order to avoid the unfair advantage that Verizon would have if it deployed the technology for its own retail use and only then filed a wholesale tariff for the Department's review. Id. at 88-89.

After the Department ruled on Verizon's motions for reconsideration and for clarification, Verizon complied by filing an illustrative PARTS tariff, which provided an end-to-end data transport from an end-user's premises to a CLEC's collocation arrangement (Exh. VZ-MA-9 (Nov. 15, 2001), att. c, § 1.1.1A ("Illustrative PARTS Tariff")). This offering was limited to end users that were served by specially-equipped remote terminals and central offices (id.). Because the Department had stated that the FCC's packet switching unbundling rules would be an "integral part" of Department's review of PARTS, the focus of the evidence presented at the evidentiary hearing was on whether the FCC's four unbundling conditions were met. See D.T.E. 98-57 Phase III, at 88; 47 C.F.R. § 51.319(c)(5).

After the evidentiary hearing closed, at least two material facts changed. First, Verizon indicated that it was conducting a first-office application of a PARTS-like service (Verizon Letter (Mar. 7, 2002)). Thus, the offering that the Department intended to review was no longer hypothetical. Second, the D.C. Circuit remanded the UNE Remand Order and remanded and vacated the Line Sharing Order in U.S. Telecom. Because this proceeding will be reopened, as discussed below, the hearing officer directs Verizon to file an updated PARTS tariff with the Department to reflect the actual PARTS offering by **November 15, 2002**.

2. Resuming the Investigation

Although the UNE Remand Order and the packet switching unbundling rules remain in effect until the FCC addresses them in the Triennial Review, the D.C. Circuit disapproved of the FCC's lack of analysis of "impairment" in determining the national list of UNEs, as well as in determining the conditional unbundling rules for "packet switching." Therefore, the viability

of the current rules is in question.⁴ The rules are not likely to remain in the same form when the FCC eventually issues an order, given the D.C. Circuit's general disapproval of the FCC's analysis, and given that the FCC has sought comments on whether the current "packet switching" definition is even technically correct, whether the packet switching rubric should explicitly include or exclude fiber optic facilities, and whether the packet switching unbundling requirement should be retained. See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, ¶ 61, CC Docket 01-338, Notice of Proposed Rulemaking, FCC 01-361 (rel. Dec. 20, 2001) ("Triennial Review NPRM"). Verizon's imminent rollout of PARTS, however, amplifies the Department's concern that Verizon may receive an unfair first-mover advantage because of the length of time necessary to review a PARTS tariff and because of the time necessary for CLECs to develop competitive retail offerings based on the PARTS architecture. Therefore, the Department will review Verizon's updated PARTS tariff without waiting for the FCC to issue its Triennial Review order.

Verizon's argument that § 251(d)(3) of the Telecommunications Act restricts the states' authority to unbundle packet switching goes too far, because the plain language of the statute provides that "the Commission *shall not preclude* the enforcement of any regulation, order, or policy of a State commission" establishing access and interconnection obligations of local exchange carriers that are "consistent" with § 251 and do not "substantially prevent implementation of the requirements of this section and the purposes of [the competitive market provisions of the Telecommunications Act]." See 47 U.S.C. § 251(d)(3) (emphasis added). Further, although Verizon is correct that "the Commission shall consider" impairment, that is a directive to the FCC; the Department is not precluded from considering impairment. See 47 U.S.C. § 251(d)(2). If the Department conducts an impairment analysis in regards to Verizon's obligation to provide a means for CLECs to offer xDSL services in a DLC environment that is consistent with the FCC's obligation to consider impairment, at a minimum, then the Department's order would be consistent with § 251, and therefore, would not be precluded.

3. Reopening the Record

In reopening the record, the Department will review Verizon's updated PARTS tariff, including any updates to the associated technologies, if any. I agree with Covad's statement that the Department need not make a conclusion today about the standard of review in this case, but rather, that this question should be answered in briefs. The parties should take note, however, that the Department's goal in proceeding with this investigation is to issue an order

⁴ Both Covad and Worldcom argue that Verizon is still obligated to comply with the UNE Remand Order and the Line Sharing Order, pursuant to the GTE merger conditions. This does not sufficiently resolve the problem if, as they argue, that obligation extends only to June 2003.

that will remain “consistent” with § 251 and will not “substantially prevent implementation” of the section, even after the FCC issues its Triennial Review order. However the parties intend to demonstrate to the Department that PARTS should or should not be available as a UNE, the Department will need to evaluate, at a minimum, whether lack of access to PARTS as a UNE will “impair” the ability of CLECs to provide xDSL services to end-users in a DLC environment in light of U.S. Telecom.

The CLECs have identified some of the factors that may be appropriate for the Department to review in evaluating impairment. These factors include, for example, the existence and extent of intermodal competition for business customers and for residential customers; the ability of CLECs to self-provision by constructing a local cable network or by collocating DSLAMs at or near Verizon’s remote terminals; and cost disparities arising from network effects, economies of scale, sunk costs, and barriers to entry arising from entry investment costs. Worldcom contends that, in reviewing impairment with respect to specific Massachusetts markets, the Department should rely on national data. There is no evidence in the record on this matter. If the Department is to rely upon national data, the parties must show why the factors demonstrating impairment in Massachusetts are the same; otherwise, the parties must present specific data, defining the relevant market or market category. See U.S. Telecom, 290 F.3d at 426.

While not requiring the application of the essential facilities doctrine⁵ to the impairment analysis, the D.C. Circuit noted that the doctrine provides useful concepts. Id. at 427 n.4. The court stated that the analysis of cost disparities must review, in addition to cost comparisons, “whether the cost characteristics of an ‘element’ render it at all unsuitable for competitive supply.” Id. at 427. One such situation that the court illustrated is “where average costs are declining throughout the range of the relevant market,” and where “duplication [of the element], even by the most efficient competitors imaginable, would only lead to higher unit costs for all firms, and thus for customers.” Id. at 426; see also PHILLIP E. AREEDA & HERBERT HOVENKAMP, 3A ANTITRUST LAW ¶¶ 771-73 (2d ed. 2002); 2 ALFRED E. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS 119-22 (1988).

By citing these factors, I am not limiting the manner in which the parties may demonstrate or refute that the CLECs’ ability to provide xDSL services in a DLC environment will be “impaired” without access to PARTS as a UNE. In reopening the record, I direct the

⁵ The four elements to be established under the essential facilities doctrine are: “(1) control of the essential facility by a monopolist; (2) a competitor’s inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility.” MCI Communications Corp. v. American Telephone and Telegraph Co., 708 F.2d 1081, 1132 (7th Cir. 1983).

parties to submit evidence, at a minimum, regarding these factors and the relevant demand and cost curves.

C. Electronic Loop Provisioning

AT&T raises extensive arguments about the need to incorporate electronic loop provisioning (“ELP”) and packetized voice signals in the rollout of NGDLC, and the issue of a line splitting arrangement in which a CLEC provides the voice service, and Verizon provides the data service (AT&T Comments at 13-19, 20-21 (June 24, 2002)). AT&T raises these issues for the first time in this proceeding, because they allegedly arise from “new circumstances” created by Verizon’s initial rollout announcement (*id.* at 20). AT&T also inquired outside of this proceeding whether it could conduct an informal presentation to the Department on the ELP technologies in the event that it is unnecessary to consider ELP along with PARTS.

Unless AT&T withdraws the ELP issue from consideration in connection with PARTS in this proceeding, AT&T may not present ELP in an informal presentation to the Department, because such a presentation would be an inappropriate ex parte communication. I will permit the parties to present information on ELP within this proceeding. In doing so, I am not making any findings that these issues are in fact relevant to PARTS. It is also unclear why this issue could only have been raised now, rather than at the time of the evidentiary hearing last year. However, the Department does not have sufficient technical information about ELP to make these determinations at this time. AT&T must demonstrate that consideration of ELP is necessary to the Department’s review of PARTS, and if so, demonstrate that the Department can direct Verizon to provide the ELP functionalities.

III. PROCEDURAL SCHEDULE

After Verizon files an updated PARTS tariff for the Department’s review, I will update the procedural schedule reopening discovery and setting additional procedural dates. I request that the parties confer on hearing dates and witness availability, and submit a proposed procedural schedule by **October 31, 2002**.

IV. MISC

Please add Jee Soo Hong, Telecommunications Division (e-mail: Jee.Soo.Hong@state.ma.us) to your distribution list in this proceeding.

Under the provisions of 220 C.M.R. § 1.06(6)(d)(3), any party may appeal this Ruling to the Commission by filing a written appeal with supporting documentation within five (5) days of this Ruling. Any appeal must include a copy of this Ruling.

Jesse S. Reyes, Hearing Officer

Date: October 18, 2002